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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

VINCENT DeMARTINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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On the Petition:
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Question Presented

Whether this Court should overrule *United States v. Gilliam,* 994 F.2d 97 (2d Cir.), *cert. denied,* _ U.S. _, 114 S.Ct. 335 (1993), which prohibits a felon in possession of a firearm defendant (18 U.S.C. § 922(g)(1)) from keeping the fact of his prior conviction from the jury, and thereby exposes the defendant to a tremendous risk of unfair prejudice?

List of Parties

Petitioner was indicted and tried individually.

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No.: _____

IN THE

Supreme Court Of The United States

October Term, 1993

VINCENT DEMARTINO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Vincent DeMartino respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 13, 1993, affirming his conviction for one count of being a convicted felon in possession of a firearm (18 U.S.C. § 922(g)(1)).

Opinion Below

The unreported opinion of the Court of Appeals is reprinted in Appendix A at pages 1a through 5a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on October 13, 1993. This petition for a writ of certiorari timely followed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Pursuant to Rule 14.1(f) of this Court, the provisions involved in this petition are set out verbatim in Appendix B at 6a to 7a. The citations to those provisions are:

U.S. CONST. AMEND. V

18 U.S.C. § 922(g)(1)

FED. R. EVID. 403, 404(b)

Jurisdiction in the Original Court

The District Court For the Eastern District of New York (Korman, J.) had jurisdiction under 18 U.S.C. § 3231.

Statement of the Case

This petition raises one of the most perplexing and troubling problems in criminal law today: the collision between "[t]he inherently prejudicial nature" of a prior felony conviction, *United States v. Jackson,* 824 F.2d 21, 25 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.), *cert. denied,* 484 U.S. 1013, 108 S.Ct. 715 (1988), and 18 U.S.C. § 922(g)(1), which, according to a recent Second Circuit

decision, now *requires* that the jury be told of the defendant's prior conviction. *United States v. Gilliam, supra.* In this petition, we demonstrate that the Second Circuit's holding guarantees a "well-nigh inescapable" inference of criminal propensity, *United States v. Carter,* 482 F.2d 738, 740 (D.C. Cir. 1973), and poses an unacceptable threat to the presumption of innocence. Accordingly, and because it is wrongly decided, *Gilliam* should be overruled. In turn, this mandates reversal of petitioner's conviction.

In this remarkable case, the government and petitioner stipulated prior to trial that petitioner had been convicted of the one prior felony required by 18 U.S.C. § 922(g)(1). Thereafter, the trial judge, exercising his sound discretion, found that, on the facts of this case, advising the jury of this conviction would only add "another piece of ... improper ... prejudicial evidence ... for them to infer he must be guilty because he was previously convicted of a felony." (A: 36)[1] Accordingly, the judge ruled that the jury (i) would not be told of the prior conviction; (ii) would not be instructed on the prior conviction element of the offense; and (iii) would not have the prior conviction portion of the indictment read to it.

Instead, the court, previewing its proposed jury charge, explained to the jury before opening statements that

> This case is here on an indictment that charges that on or about the 16th day of December, 1991, in the Eastern District of New York, the defendant Vincent DeMartino knowingly and willfully possessed

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[1] Numbers preceded by the letter "A:" refer to pages of the joint appendix submitted to the Court of Appeals.

> a firearm under circumstances which Congress has chosen to criminalize.
>
> As I told you during the process of jury selection, it's not disputed in this case that those circumstances are present here. And, so, the only issue you have to resolve is the issue of whether the defendant, in fact, possessed the firearm as alleged in the indictment.

(A: 107)

In the court's view, informed by its first-hand knowledge of the evidence, this alternative minimized the risk of the jurors assuming "that this is some sort of an innocent possession." (A: 34) At the same time, it preserved, to the fullest degree possible, DeMartino's right to a trial free from unfair inferences of guilt. With the prosecution's interest thus protected, the court felt that no legitimate purpose would be served by nonsensically "read[ing] this portion of the indictment to the jury, and then tell[ing] them they don't have to worry about it because it's already been stipulated to." (A: 29) *See United States v. Gill,* 490 F.2d 233, 238 (7th Cir. 1973), *cert. denied,* 417 U.S. 968, 94 S.Ct. 3171 (1974) (defining commerce element of Hobbs Act for jury would be "a meaningless instruction" where defendant stipulated to that element).

Subsequently, though, the Court of Appeals, in a ruling of first impression for that Court, issued, without explanation, a conditional writ of mandamus. Notwithstanding the stipulation, the writ essentially required Judge Korman to instruct the jury on all of the elements of the offense, including the prior conviction requirement. *See also United States v. Brinklow,* 560 F.2d

1003 (10th Cir. 1977), *cert. denied,* 434 U.S. 1047, 98 S.Ct. 893 (1978) (rejecting jury instruction that omitted prior conviction element where defendant stipulated to that element); *United States v. Williams,* 612 F.2d 735 (3d Cir. 1979), *cert. denied,* 445 U.S. 934, 100 S.Ct. 1328 (1980) (fact of prior conviction could not be kept from jury notwithstanding defendant's stipulation); *United States v. Torres,* 610 F.Supp. 1089, 1092 (D.C.N.Y. 1985) (refusing to keep jury from "ever learning that such convictions exist or that a conviction is an element of the offenses charged;" court instructed instead that "an element of the offenses ... is the presence of a prior felony conviction and that defendant stipulates to that element") (footnote omitted). *Cf. United States v. Collamore,* 868 F.2d 24 (1st Cir. 1989), *reh'g denied* (no bifurcation of possession and prior conviction aspects of felon in possession case); *United States v. Birdsong,* 982 F.2d 481 (11th Cir.), *cert. denied,* _ U.S. _, 113 S.Ct. 2984 (1993) (same); *United States v. Barker,* 1 F.3d 957 (9th Cir. 1993) (same).

In declining to "charge the jury voluntarily on the elements of the offense" (A: 189), Judge Korman complied with the mandate to the extent of instructing the jury about both the prior conviction requirement and DeMartino's stipulation.

Thereafter, Judge Jack B. Weinstein declined to follow the Court of Appeals' holding in *United States v. Orena,* 811 F.Supp. 819, 820 (E.D.N.Y. 1992) (government not "entitled to inform the jury ... that defendant is a convicted felon even though defendant concedes that this element need not be proved"). Then, prior to its affirmance of DeMartino's conviction, the Second Circuit rejected *Orena* in deciding *Gilliam.* As detailed *infra, Gilliam* essentially creates a *per se* rule that, even when the defendant concedes his prior felon status, the jury must always be instructed on all the elements of the offense, and must always be told of the defendant's concession.

On DeMartino's direct appeal, we argued that his conviction should be reversed because, among other reasons, *Gilliam* was wrongly decided. However, the Court of Appeals refused to reconsider *Gilliam* absent, *inter alia*, a directive from a "higher authority." (Appendix A at 5a)

As we show below, *Gilliam* misunderstands and seriously underestimates the fact that defendants are prejudiced by a prior conviction *even if it is an element of the charged offense*. *See, e.g., United States v. Orena, supra,* 811 F.Supp. at 822; *United States v. Jackson, supra,* 824 F.2d at 25; *United States v. Daniels,* 770 F.2d 1111, 1116, 1118 (D.C. Cir. 1985); *United States v. Romero*, 603 F.2d 640, 641 (7th Cir. 1979); *United States v. Figueroa,* 618 F.2d 934, 943 (2d Cir. 1980).

In addition, *Gilliam* rests upon the misguided precept that a jury must have "full knowledge of the crime" in order "to make a totally informed judgment." 994 F.2d at 101, 102. As we proceed to show, this notion flies in the face of the Federal Rules of Evidence, the very purpose of which is to *restrict* the jury's "knowledge of the crime" by excluding prejudicial information such as hearsay.

Moreover, in making an unwarranted *per se* ruling, the *Gilliam* court arrogated unto itself the sound discretion of the trial court. *Ipso facto,* trial judges are in the best position to determine whether there is genuine "prosecutorial need" for the jury to know of the prior conviction, *United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir. 1976), or whether, as Judge Korman felt here, the government is merely trying to "rub it in." (A: 192) *See United States v. Orena, supra,* 811 F.Supp. at 827 ("Turning as it does on subtleties of fact and the nuances of courtroom atmospherics, prejudice is a matter for the sensitive exercise of a district judge's discretion").

"Unfortunately, a side consequence of the [felon in possession of a weapon] law has been to provide federal prosecutors with a powerful tool for circumventing the

traditional rule against introduction of other crimes evidence." *United States v. Daniels, supra,* 770 F.2d at 1118. Viewed in this light, *Gilliam* plainly represents a significant and dangerous expansion of the potential for misuse and unfair prejudice. In a multi-count trial, for example, *Gilliam* allows the prosecutor to infect the entire trial with otherwise inadmissible other crimes evidence, even though the § 922(g)(1) charge is often the least significant in the indictment. *See United States v. Orena, supra,* 811 F.Supp. at 823 (*citing United States v. DeSantis,* 802 F.Supp. 794 (E.D.N.Y. 1992)). This being so, *Gilliam* should not be allowed to stand, and DeMartino's conviction should be reversed.

Statement of Facts

One would need to search long and hard for a case with facts as simple as those here. Given the above mentioned stipulation, DeMartino's status as a felon was not in dispute. Rather, the only issue was whether he had actually possessed a gun, or whether the police had "planted" it on him.

Patrick Maggiore, a New York City Detective, was the government's principal witness. Maggiore testified that, on December 16, 1991, he and Detective Joseph Simone had been assigned to follow DeMartino. (A: 133) After temporarily abating their surveillance, the officers relocated DeMartino's car later that morning. (A: 135) A few hours after that, Detective Maggiore observed DeMartino backing through an intersection in Brooklyn. (A: 136) Thereafter, DeMartino parked directly in front of the officers' car, which, in turn, was double parked next to a 1977 gray Cadillac. (*Id.*)

At this time, the officers saw Gabe Scianna and Michael Spataro attempting to open the Cadillac's lock

with a coat hanger. (*Id.*) Then, according to Detective Maggiore,

> I backed my car up. And he [DeMartino] proceeded to back his car up and park directly behind the '77 Cadillac. I then pulled my car between the '77 Cadillac and Mr. DeMartino's car. I exited the car. I had the shield in my hand, approached Mr. DeMartino and asked him to turn around and put his hand on the roof of the car, which he did.
>
> I walked over to him and asked him, Vinny, do you have anything on you? And he said, yes, I have a gun in my waistband, which I pulled out and notified my partner that I recovered a gun.

(A: 137)

This was the heart of the government's case. In addition, however, the following significant additional proof was adduced:

a. F.B.I. Agent Lindley De Vecchio was permitted to give expert testimony that, on December 16, 1991, "there was a conflict within a certain criminal gang," that there were two rival factions, and that "people from one faction were shooting at people from the other faction and vice versa." (A: 126)[2]

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[2] Agent De Vecchio was referring, in a sanitized form, to the "Colombo Family" war discussed in *United States v. Orena*, 986 F.2d 628, 629 (2d Cir. 1993).

b. De Vecchio also testified that Scianna and Spataro "were associated in the same faction within that criminal gang." (A: 127) However, *absolutely no proof was adduced that DeMartino was part of the "gang."* Rather, all that the government could proffer was DeMartino's address book (A: 143), which contained Spataro's and Scianna's names. *(See* A: 297)

c. Over defense objection (A: 96-97), the government was permitted to introduce two guns seized from Scianna and Spataro, as well as a ski mask taken from the '77 Cadillac. (A: 143-44)[3]

In response to this proof, the defense contended that the officers had "planted" the gun on DeMartino. In support of this claim, counsel proffered the following arguments:

a. The police officers were following DeMartino, and had the opportunity to plant the gun.

b. When he testified in the grand jury, Detective Maggiore did not claim that DeMartino had admitted to possessing a gun. (A: 168)

c. Although there was car traffic and "people [were] walking up and down the street" (A:

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[3] Maggiore testified that the Cadillac belonged to Spataro's wife. (A: 143-44)

148) at the arrest location, the officers made no effort to secure civilian witnesses. (A: 156)

d. There was no effort to obtain fingerprint evidence. (A: 160)

e. There was no effort to ascertain to whom the gun was registered, even though it had a registration number. (A: 155)

f. It was inherently unlikely that DeMartino, while carrying a gun during a supposed gang war, would have backed through an intersection and exposed himself to a police stop.

Finally, the cross-examination of Detective Joseph Simone revealed that he had previously supplied a false affidavit[4] stating that he had personally observed DeMartino in possession of the gun. (A: 266) The defense contended that this act of perjury[5] demonstrated the officers' willingness falsely to accuse DeMartino.

In sum, then, this short trial, spanning just some 300 pages of transcript (much of it colloquy), yielded a very close case on the issue of possession. In order to convict

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[4] Simone had provided the affidavit in connection with the initial New York State arraignment of DeMartino. (A: 264) Subsequently, DeMartino was prosecuted federally.

[5] Simone claimed that "I didn't realize I [had] sworn falsely." (A: 266) However, the proof also revealed that he had reviewed the sworn statement both at the time he signed it and prior to trial. (A: 268-70)

petitioner, the jury had to believe the officers' uncorroborated testimony. Yet, there were ample grounds for the jury to conclude that these officers were unworthy of belief. This being so, the error we discuss below cannot be dismissed as harmless.

REASON FOR GRANTING THE WRIT

This Court Should Overrule *United States v. Gilliam*

A. INTRODUCTION

It is well-established that other crimes evidence presents a special risk of prejudice to criminal defendants. In fact, many courts have recognized that "[e]vidence of a prior crime is always ... prejudicial to a defendant. It diverts the attention of the jury from the question of the defendant's responsibility for the crime charged to the improper issue of his bad character." *United States v. Daniels, supra,* 770 F.2d at 1116 [(*quoting United States v. James,* 555 F.2d 992, 1000 (D.C. Cir. 1977)) (*quoting United States v. Phillips,* 401 F.2d 301, 305 (7th Cir. 1968))].

Other crimes evidence is frowned upon because it is human nature to infer from it that the defendant is a "bad man," *United States v. Romero, supra,* 603 F.2d at 641 (*quoting United States v. Barfield,* 527 F.2d 858, 861 (5th Cir. 1976)), with "a propensity toward criminal acts," *United States v. Orena, supra,* 811 F.Supp. at 822. As one court said, "[t]o tell a jury to ignore the defendant's convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." *United States v. Daniels, supra,* 770 F.2d at 1118.

However, such inferences of "guilt by reputation," *United States v. Cook,* 538 F.2d 1000, 1004 (D.C. Cir.

1976), offend our "fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds," *United States v. Daniels, supra,* 770 F.2d at 1116 (*citing Michelson v. United States,* 335 U.S. 469, 475-76, 69 S.Ct. 213, 218-19 (1948) (other citations omitted)). Consequently, the law has erected formidable barriers to the admission of other crimes evidence. *See, e.g.,* Fed. R. Evid. 403, 404(b) (evidence of other crimes "not admissible to prove the character of a person in order to show that he acted in conformity therewith").

In this PETITION, we demonstrate that the Second Circuit's decision in *United States v. Gilliam, supra,* represents a radical departure from these principles. In essence, *Gilliam* allows other crimes evidence to come crashing through the barriers whenever the prosecutor chooses to tack a § 922(g)(1) charge onto the indictment -- *even when the defendant concedes he is a convicted felon.* In such circumstances, as Judge Korman recognized at the trial of this case, "read[ing] this portion of the indictment to the jury, and then tell[ing] them they don't have to worry about it because it's already been stipulated to" (A: 29), is "a meaningless instruction." *United States v. Gill, supra,* 490 F.2d at 238. Moreover, it leads inexorably to the inference that the defendant "must be guilty because he was previously convicted of a felony" (A: 36) -- the very inference which the law's "carefully constructed protections," *United States v. Orena, supra,* 811 F.Supp. at 827, are designed to prevent. Rarely has there been a more misguided result.

B. THE *GILLIAM* DECISION

The facts in *Gilliam* are virtually identical to those in this case. There, as here, the defendant and the government stipulated "that the weapon in question had travelled in interstate commerce, and that Gilliam had

previously been convicted of a felony punishable by imprisonment for more than one year." 994 F.2d at 98. Thereafter, and also as in this case, Gilliam proposed, and the government rejected, a stipulation to concede the prior conviction element "and thereby keep the fact of his prior conviction from the jury." *Id.* Unlike Judge Korman here, however, Gilliam's trial judge refused to require the government to accept the second stipulation.[6] *Id.*

On appeal, the Second Circuit rejected Gilliam's argument that the trial court should have accepted his proposed stipulation. In so ruling, the Court first stated that "[w]here the prior conviction is essential to proving the crime, it is by definition not prejudicial." 994 F.2d at 100. *Accord, United States v. Barker, supra,* 1 F.3d at 959, n.3 ("A prior conviction is not prejudicial when it is an element of the charged crime").

Then, backing off this sweeping assertion, the Court acknowledged that

> It is true, though, that the fact of a prior conviction may have an additional and adverse impact upon the § 922(g)(1) defendant, if the jury is unduly influenced by the prior conviction. But where the district court issues a proper curative instruction, we must presume that a conscientious jury will only use the proof of the prior conviction to satisfy the element of the crime.

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[6] Tellingly, neither DeMartino's nor Gilliam's prosecutors objected to keeping the interstate commerce requirement from the jury. In DeMartino's case, this led Judge Korman to question the prosecutors' motives for vehemently insisting that the jury be told of the prior conviction. (A: 44)

Id. (citations omitted)

Next follows the heart of the Court's opinion:

> Gilliam nevertheless argues that there is no harm done if he concedes the prior conviction element and proceeds to trial merely on the possession issue. He points out that in such a situation, an ounce of prevention is worth a pound of cure: there would be no need for a curative instruction, because the potential for prejudice would be prevented. But there is harm done by his proposal, harm to the judicial process and the role of the jury in determining the guilt or innocence of the crime as charged. Gilliam's proposal violates the very foundation of the jury system. It removes from the jury's consideration an element of the crime, leaving the jury in a position only to make findings of fact on a particular element without knowing the true import of those findings. Again, Gilliam is not charged with mere possession of a weapon, but with possession by a convicted felon. The jury speaks for the community in condemning such behavior, and it cannot condemn such behavior if it is unaware of the nature of the crime charged.
>
> Gilliam misunderstands the role of the jury in a criminal trial. Our constitution guarantees the accused the right of a trial by a jury of his peers, primarily in order to ensure that the accused is judged by prevailing community mores.... As representatives of the people, the jurors can

> rebuke the accused for violation of community standards, morals, or principles.... The jury is the oracle of the citizenry in weighing the culpability of the accused, and should it find him guilty it condemns him with the full legal and moral authority of the society. The public listens with rapt attention to the jury's pronouncement of guilt or innocence, for in that singular moment the convictions and conscience of the entire community are expressed.
>
> It is unnecessary to engage in an extensive dialogue on jury nullification or to summarize the Founding Fathers' belief in the right of the jury to say "no...." Without full knowledge of the nature of the crime, the jury cannot speak for the people or exert their authority. If an element of the crime is conceded and stripped away from the jury's consideration, the jurors become no more than factfinders. The jury must know why it is convicting or acquitting the defendant, because that is simply how our judicial system is designed to work.

994 F.2d at 101 (citations omitted).

Finally, the Court, quoting *United States v. Collamore, supra,* 868 F.2d at 28, worried that "when a jury is neither read the statute setting forth the crime nor told of all the elements of the crime, it may, justifiably, question whether what the accused did was a crime." 994 F.2d at 102. *Accord, United States v. Williams, supra; United States v. Torres, supra; United States v. Barker, supra;*

United States v. Birdsong, supra; United States v. Brinklow, supra.

In essence, then, the Court's opinion resolves into three propositions. *First,* the Court contends that proof of an element of the offense is inherently non-prejudicial, and, in any event, any ancillary prejudice can be cured by a limiting instruction. *Second,* the Court claims that the jury must "make a totally informed judgment," 994 F.2d at 102, in order to carry out its function as "oracle of the citizenry," *Id.* at 101. Finally, *third,* the Court fears that, if the jury is not totally informed, it may wrongly acquit the defendant. As we proceed to demonstrate, each of these arguments is seriously flawed.

C. *GILLIAM* IS WRONGLY DECIDED

In the first instance, the *Gilliam* Court misunderstands and grossly underestimates the special risk of prejudice posed by other crimes evidence. Indeed, the Court's position contravenes the overwhelming weight of authority holding that such evidence is "inherently prejudicial." *United States v. Jackson, supra,* 824 F.2d at 25 (Ruth Bader Ginsburg, J.). *See supra* at 1, 11 and authorities cited. In fact, *Gilliam* jettisons the Second Circuit's own definition of prejudice. In *United States v. Figueroa, supra,* Judge Jon O. Newman, now Chief Judge of the Second Circuit, explained that evidence is prejudicial

> *when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence.... The prejudicial effect may be created by the tendency of the evidence to prove some adverse fact not properly in issue or unfairly to excite emotions against the*

> *defendant.* A prior conviction is material to a defendant's intent (when intent is in issue), *but it is also prejudicial to the extent that it also tends to prove a defendant's propensity to commit crimes.* When material evidence has an additional prejudicial effect, Rule 403 requires the trial court to make a conscientious assessment of whether the probative value of the evidence on a disputed issue in the case is substantially outweighed by the prejudicial tendency of the evidence to have some other adverse effect upon the defendant.

618 F.2d at 943 (emphasis supplied).

Hence, other crimes evidence does not lose its prejudicial character merely because, as here, it may also be "material" to proving an element of the crime. This is so because, beyond establishing the statute's prior conviction requirement, such evidence also has an additional "adverse effect." Specifically, the prior conviction also improperly suggests that the defendant must have possessed the firearm because he is a "bad man," *United States v. Romero, supra,* with a "propensity to commit crimes," *United States v. Figueroa, supra.*

Judge Weinstein confirmed that this is so in *United States v. Orena, supra*:

> The government's proof of certain elements of crimes sometimes will include evidence, usually prior crimes or bad acts committed by the defendant, with potentially prejudicial impact. Such evidence, while relevant to elements the government must establish, poses the risk that the jury unfairly

> will conclude that the defendant has a propensity toward criminal acts.

811 F.Supp. at 822.

Similarly, then Circuit Judge and now Justice Ginsburg, discussing the precursor statute to § 922(g)(1), has discerned

> A strong policy of avoiding the introduction of this potentially prejudicial evidence in criminal trials ... in both congressional reluctance to make a prior criminal conviction an element of a criminal offense and the manner in which recidivist or "habitual offender" statutes are often drafted to insure that this evidence is kept from the jury's view.

United States v. Jackson, supra, 824 F.2d at 25 (footnote omitted).

Thus, the *Gilliam* Court is simply wrong when it asserts that "where the prior conviction is an element of the crime, it is by definition not prejudicial." Indeed, Judge Walker, concurring in *Gilliam,* rebuked this position:

> Because the stipulation with respect to Gilliam's felony conviction satisfied the prior conviction element of the charged 18 U.S.C. § 922(g)(1) offense, the majority states that "it [was] by definition not prejudicial" within the meaning of Fed.R.Evid. 403. Majority Opinion at 101. I disagree. I think it is undeniable that the stipulation posed a risk of unfair prejudice

> to defendant Gilliam.... [O]therwise admissible evidence always poses a risk of unfair prejudice if it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed.R.Evid. 403, advisory committe note; *see United States v. Deutsch*, 987 F.2d 878, 884 (2d Cir. 1993).

United States v. Gilliam, supra, 994 F.2d at 104 (Walker, J., concurring).

Hence, the real question in *Gilliam*, and in this case, was not whether the stipulation was prejudicial, but whether it should be admitted notwithstanding its prejudicial character. This is a classic Rule 403 balancing question, best reserved for the sound discretion of the trial judge. *See United States v. Orena, supra*, 811 F.Supp. at 827 ("Turning as it does on subtleties of fact and the nuances of courtroom atmospherics, prejudice is a matter for the sensitive exercise of a district judge's discretion").

In this case, Judge Korman carefully assessed the quantum of the evidence, and concluded that there was no genuine "prosecutorial need" for the jury to know about the stipulation. *United States v. Spletzer, supra*, 535 F.2d at 956. On the other hand, he concluded that telling the jury about the stipulation would only serve to "rub ... in" (A: 192), the wholly illicit inference that defendant "must be guilty because he was previously convicted of a felony." (A: 36) Ordinarily, such determinations, interwoven as they are with "subtleties of fact and the nuances of courtroom atmospherics," *United States v. Orena, supra*, are reviewed for an abuse of discretion. Yet, both here and in *Gilliam*, the Second Circuit, from a cold appellate record, substituted its own discretion for that of the trial judge. This is a very disturbing precedent.

The *Gilliam* Court also claims that any ancillary prejudice flowing to a defendant from the prior conviction can be cured by a limiting instruction. 994 F.2d at 100. We respectfully submit that this is pure fiction. It is generally true that, "[w]hatever the criticism of such instructions, they remain an accepted part of our present trial system." *United States v. Figueroa, supra,* 618 F.2d at 943 (footnote omitted). However, the great bulk of courts

> are not nearly so sanguine concerning the efficacy of jury instructions in curing the prejudiced caused by the introduction of other crimes evidence.... In such cases, it becomes particularly unrealistic to expect effective execution of the "mental gymnastic" required by limiting instructions, *Nash v. United States,* 54 F.2d 1006, 1007 (2d Cir.) (Learned Hand, J.), *cert. denied,* 285 U.S. 556, 52 S.Ct. 457 ... (1932), and "the naive assumption that prejudicial effects can be overcome by instructions to jury" becomes more clearly than ever "unmitigated fiction," *Krulewitch v. United States,* 336 U.S. 440, 453, 69 S.Ct. 716, 723 ... (1949) (Jackson, J., concurring). As the Third Circuit has observed, once evidence of prior crimes reaches the jury, "it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk." *Government of the Virgin Islands v. Toto,* 529 F.2d 278, 283 (3d Cir. 1976); *accord; United States v. Carter,* [*supra,*] 482 F.2d [at] 740....

United States v. Daniels, supra, 770 F.2d at 1118.

As for *Gilliam's* contention that the jury must have "full knowledge of the nature of the crime," 994 F.2d at 101, it flies in the face of our entire trial system. In a very real sense, the Rules of Evidence are structured to *prevent* the jury from having "full knowledge of the nature of the crime." It is for this reason, among others, that unreliable and prejudicial information such as hearsay is deemed inadmissible. Often, such information speaks more eloquently about the true nature of the offense than the admissible proof. Yet, despite the relevance of, *e.g.*, hearsay, it is withheld from the jury's consideration, *inter alia*, because its potential for prejudice outweighs its truth-promoting value. Indeed, in this very case, the jury was not advised that the supposed "gang war" at issue involved the alleged "Colombo Organized Crime Family." *Supra* at n.2. While arguably relevant to the gun possession issue, this "fact," it was feared, would indelibly color the jury's view of DeMartino. These same concerns apply to other crimes evidence -- *especially where the defendant concedes his prior conviction.*

More fundamentally, though, the *Gilliam* holding misconceives the proper role of the jury. Simply put, the jury's primary function is to find facts, and apply the law as instructed by the trial judge. Contrary to the Court's assertion, its primary function is *not* to serve as the arbiter of community morality. This is so because "community morality" is not as monolithic as the Court makes it out to be. Rather, it is as diverse as each of our own ethical codes. The law represents the closest possible approximation of a moral consensus. By contrast, no criminal defendant should be judged by someone else's moral idiosyncracies. This is precisely why jurors are supposed to apply the governing law, regardless of whether or not they like it.

Taken to its extreme, then, the *Gilliam* opinion is an argument for jury nullification as the rule, rather than

the exception. Our legal system cannot function, and the rule of law cannot be enforced, on this basis.

Moreover, *Gilliam* posits that "the jury must be informed of all the elements of the crime charged," 994 F.2d at 102, in order to "find the defendant guilty of the offense at issue beyond a reasonable doubt," *Id.* at 101. Plainly, the right to proof of every element beyond a reasonable doubt primarily protects the defendant, not the government. 994 F.2d at 101-02. *See, e.g., Francis v. Franklin,* 471 U.S. 307, 313, 105 S.Ct. 1965, 1970 (1985) (Due Process Clause prohibits jury instructions that "reliev[e] the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime"). "A stipulation represents a defendant's waiver of that right." *United States v. James,* 987 F.2d 648, 655 (9th Cir. 1993) (Alarcon, J., dissenting) (*quoting United States v. Orena, supra,* 811 F.Supp. at 824). Indeed, such a waiver actually serves to lighten the government's evidentiary burden. Thus, in manipulating to the government's benefit the defendant's right to put the government to its proof, the Court has turned this right on its ear.

Finally, *Gilliam*, echoing *United States v. Collamore, supra,* speculates that "when a jury is neither read the statue setting forth the crime nor told of all the elements of the crime, it may, justifiably, question whether what the accused did really was a crime." 994 F.2d at 102 (*quoting United States v. Collamore*, *supra,* 868 F.2d at 28). This concern is unfounded. In this case, for example, Judge Korman found that the danger of the jury assuming "some sort of innocent possession" (A: 34), could be alleviated by charging the jury that

> [t]his case is here on an indictment that charges that on or about the 16th day of December, 1991, in the Eastern District of New York, the defendant Vincent

> DeMartino knowingly and willfully possessed a firearm under circumstances which Congress has chosen to criminalize.
>
> As I told you during the process of jury selection, it's not disputed in this case that those circumstances are present here. And, so, the only issue you have to resolve is the issue of whether the defendant, in fact, possessed the firearm as alleged in the indictment.

(A: 107)

Similarly, in *United States v. Orena, supra,* Judge Weinstein held that

> Adaptation of the court's instructions to the jury provides another means of avoiding prejudice. When the defendant stipulates that he is a convicted felon and so requests, the court may instruct the jury that the law deems possession of a firearm illegal in certain circumstances and that the parties have agreed that such circumstances exist. The jury should be told, as always, of its duty to apply the law as instructed, and that it need not concern itself with why possession was illegal in the case at hand.
>
> * * *
>
> Potential unfairness to the government due to the possibility of jury nullification can be foreclosed. A proper charge directs the jury that it is obligated to apply the law, as explained to it by the court,

> fairly and impartially to the facts as it finds them. The government is entitled to no less and no more.

811 F.Supp. at 823, 825.

As the *Gilliam* Court vigorously insists, jurors are presumed to follow such instructions. 994 F.2d at 100 and authorities cited. Hence, any contrary action by the jury could only be attributable to jury nullification -- a prerogative which the *Gilliam* Court passionately defends.

In addition to its logical failings, *Gilliam* fails to consider the dangerous ramifications of its *per se* ruling. *First,* as already noted, *Gilliam* reduces the "carefully constructed protections" against other crimes evidence to "a futile barricade." *United States v. Orena, supra,* 811 F.Supp. at 827. It does this by guaranteeing the admission of otherwise inadmissible other crimes evidence, *even where the defendant concedes his prior conviction. Second, Gilliam* gives prosecutors an incentive to include a § 922(g)(1) charge in a multi-count indictment, if only to insure that the other crimes evidence goes before the jury. *Third,* in a multi-count trial, *Gilliam* "threatens to infect the entirety of the jury's determination" with unfair prejudice stemming from the § 922(g)(1) count, usually the least significant in the indictment. *United States v. Orena, supra,* 811 F.Supp. at 823. *Fourth,* and finally, *Gilliam* usurps the trial court's Rule 403 discretion to weigh the "prosecutorial need," *United States v. Spletzer, supra,* 535 F.2d at 956, for a "meaningless instruction," *United States v. Gill, supra,* 490 F.2d at 238, against that instruction's "well-nigh inescapable" burden on the presumption of innocence, *United States v. Carter, supra,* 482 F.2d at 740.

A decision which considers all of these ramifications, and reaches the opposite conclusion, is *United States v. Orena, supra.* There, on facts

indistinguishable from those in this case or in *Gilliam*, Judge Weinstein held that the government was *not* "entitled to inform the jury as an element of an offense that defendant is a convicted felon even though defendant concedes that this element need not be proved." 811 F.Supp. at 820. Before reviewing the traditional protections against other crimes evidence, *id.* at 826, the Court observed that

> [a] stipulation alone may not adequately address problems of prejudice. In prosecutions involving statutes that contain a status element, here a felony conviction, 18 U.S.C. § 922(g)(1), a defendant is placed in the difficult position of not being able to avoid the risk of prejudice through the device of a stipulation as to an evidentiary fact. Such a stipulation loses much of its value in avoiding potential prejudice. Even complete concession of the fact of the conviction does not keep from the jury the fact that the defendant is a convicted felon.... A defendant's careful efforts to preserve his presumption of innocence, including his decision not to testify and subject himself to cross-examination about his past, can be circumvented by the simple mention in the language of a statute of a prior conviction.

811 F.Supp. at 823.

With this premise in mind, the court went on to hold:

> These carefully constructed protections would amount to a futile barricade, a Maginot Line easily swept around, were the jury to learn from the court's charge -- after having been assiduously kept in the dark throughout the presentation of the evidence -- that the defendant is a convicted felon. For reasons of both sound statutory interpretation and constitutional policy, a defendant who is willing to stipulate to the felony-conviction element of the crime is, in circumstances where prejudice far outweighs probative value, entitled to an instruction that ensures that the jury will not learn of his criminal record.

811 F.Supp. at 827.[7]

For all of the foregoing reasons, we submit that *Orena*, along with Judge Korman's rulings at DeMartino's trial, offer the better approach to preserving the presumption of innocence in a § 922(g)(1) case. Accordingly, we ask this Court to overrule *Gilliam*, and reverse DeMartino's conviction.

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[7] The *Gilliam* Court found *Orena* unpersuasive because it ostensibly "eliminates an element of a crime legislated by Congress." 994 F.2d at 102. *See United States v. Williams, supra*, 612 F.2d at 740. In actuality, though, *Orena* does not eliminate any element of the crime, but merely allows the defendant to concede it. In turn, this lightens the government's evidentiary burden. Hence, *Orena* furthers, not frustrates, Congressional intent.

Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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On the Petition
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APPENDIX

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of October, one thousand nine hundred and ninety-three.

PRESENT:

HON. LAWRENCE W. PIERCE,
HON. ROGER J. MINER,
HON. FRANK X. ALTIMARI,
Circuit Judges.

Docket No. 93-1320

UNITED STATES OF AMERICA,
Appellee,

v.

VINCENT DeMARTINO,
Defendant-Appellant.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Eastern District of New York, it is hereby

Appendix A
Opinion of the United States Court of Appeals

ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is affirmed.

Defendant-appellant Vincent DeMartino appeals from judgment entered on April 27, 1993 in the United States District Court for the Eastern District of New York (Korman, J.), after a jury trial, convicting him of being an ex-felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

DeMartino was under police surveillance because of his suspected involvement in the internal war that began in 1991 within the Colombo Family of La Cosa Nostra. On December 16, 1991, Detectives Patrick Maggiore and Joseph Simone were assigned to surveil DeMartino. They observed DeMartino illegally back his car through an intersection and double park next to a 1977 Cadillac where Gabriel Scianna and Michael Spataro, known members of the same faction of the Colombo crime family, were standing. Maggiore observed that Scianna and Spataro were attempting to break into the Cadillac with a wire hanger.

Maggiore then arrested DeMartino for the traffic violation and proceeded to search him. The search revealed a loaded 9mm pistol in DeMartino's waistband. Scianna and Spataro were also searched and each was found to be carrying a 9mm pistol. A ski mask was found in the 1977 Cadillac.

DeMartino contends that the District Court erred in admitting the weapons seized from Scianna and Spataro

and the ski mask seized from the Cadillac because this evidence (1) was not relevant and (2) any relevance it had was "vastly outweighed" by the danger that the jury would convict based on guilt by association.

Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. A district court has broad discretion in making evidentiary rulings, see United States v. Schafrick, 871 F.2d 300, 305 (2d Cir. 1989), and this Court will not disturb an evidentiary ruling "unless the judge acted arbitrarily or irrationally." United States v. Blanco, 861 F.2d 773, 781 (2d Cir. 1988), cert. denied, 489 U.S. 1019 (1989).

We find that the District Court acted within its discretion in admitting the guns and ski mask. First of all, the evidence was relevant. The jury had sufficient evidence that DeMartino was associated with Scianna and Spataro and could conclude that they were all armed and engaged together in criminal activity. Particularly, the jury could infer, based on the expert testimony regarding Scianna's and Spataro's involvement in the war between the Colombo family factions, that DeMartino was involved in this war along with the other two.

The evidence of the guns was also relevant to rebut DeMartino's defense that the gun was planted on him.

The fact that the guns seized from all three men were similar 9mm pistols negates the likelihood that the gun was planted on DeMartino. Put in perspective, DeMartino's defense becomes less plausible: the inference is either that the agents coincidentally planted a similar gun on DeMartino or planted similar guns on all three -- both unlikely scenarios.

Finally, the probative value of this evidence was not substantially outweighed by unfair prejudice so as to justify its exclusion under Fed. R. Evid. 403. DeMartino's contention on this point is that the evidence could only be used to infer guilt by association. The District Court explicitly instructed the jury that mere association with criminals did not establish the defendant's guilt. The jury is presumed to have followed these instructions. See Zafiro v. United States, 113 S. Ct. 933, 939 (1993); Richardson v. Marsh, 481 U.S. 200, 211 (1987). We believe that the limiting instruction was sufficient to eliminate any undue prejudice to DeMartino.

DeMartino next contends that the District Court erred in refusing to admit the testimony of two bystanders who witnessed the scene of DeMartino's arrest and claim they saw police officers assault an innocent bystander. DeMartino offered the evidence to show a possible motive that the arresting officers might have had to plant the gun on him.

We find that the District Court did not abuse its discretion in excluding this testimony based on its lack of relevancy and on the likelihood that a "trial within a trial" would result. Under Fed. R. Evid. 404(b), which governs

the admissibility of prior crimes, wrongs or acts, evidence of this assault may be admissible if it were relevant to the intent of the agents to plant the gun on DeMartino. Here, the relevance of the testimony was marginal at best. As the District Court noted, it would be a little more reasonable to suspect that the police would plant a weapon on the person they assaulted, but it simply does not follow that the police would assault one person, then frame another to cover themselves. Even if there was some marginal relevancy, the District Court properly excluded the evidence. Any relevancy was substantially outweighed by the likelihood of "confusion of the issues, or misleading the jury" and by "considerations of undue delay," Fed. R. Evid. 403, created by the "trial within a trial" that would have been required to resolve the assault issue. See United States v. Aboumoussallem, 726 F.2d 906, 911-12 (2d Cir. 1984)

Finally, we decline DeMartino's invitation to overrule our recent decision in United States v. Gilliam, 994 F.2d 97 (2d Cir. 1993), petition for cert. filed, August 31, 1993, No. 93-5902, permitting the Government to introduce evidence of a defendant's felony conviction to prove that he is an ex-felon under 18 U.S.C. § 922(g)(1). This Court will not overrule a prior decision of a panel of this Court absent a change in the law by higher authority or by way of an in banc proceeding of this Court. United States v. Moore, 949 F.2d 68, 71 (2d Cir. 1991), cert. denied, 112 S. Ct. 1678 (1992).

Appendix B
Constitutional and Statutory Provisions

U.S. CONST. AMEND. V states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 922(g)(1) states:

> (g) It shall be unlawful for any person --
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Appendix B
Constitutional and Statutory Provisions

FED. R. EVID. 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 404(b) states:

> (b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.